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No. 83-507
IN THE

Supreme Court of the United States

October Term, 1983

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Petitioner,

vs.

SHELTER FRAMING CORPORATION and G&R ROOFING
COMPANY,

Respondents.

**Reply Brief in Support of
Petition for Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit.**

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I.

INTRODUCTORY STATEMENT.

In the present proceeding, petitioner Carpenters Pension Trust for Southern California ("CPT") seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Shelter Framing Corporation, et al. v. Pension Benefit Guaranty Corporation, et al.*, 705 F.2d 1502 (9th Cir. 1983). The decision of the Ninth Circuit in *Shelter Framing* disposed of six separate appeals, each arising from federal court litigation regarding the constitutionality of the "withdrawal liability" provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

Two of the parties to one of the consolidated actions filed their appeals directly to this Court.¹ *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.* (No. 83-245), *Oregon-Washington Carpenters-Employers Pension Trust Fund v. R. A. Gray & Co.* (No. 83-291) (the "Gray appeals"). This Court has already noted probable jurisdiction in these actions on October 17, 1983.

The Petition for Writ of Certiorari in the present case was filed on September 24, 1983. Subsequently, Shelter Framing Corporation ("SFC"), G&R Roofing Company ("G&R") and the Pension Benefit Guaranty Corporation ("PBGC") all filed briefs in opposition to the Petition for Writ of Certiorari.

II.

THE PETITION PRESENTS ISSUES OF SIGNIFICANT PUBLIC IMPORTANCE WHICH DESERVE SCRUTINY BY THIS COURT.

A. The Retroactivity Issue.

The CPT has asked this Court to review the Ninth Circuit's determination that the MPPAA is unconstitutional as applied to employers who "withdrew" from multiemployer pension plans between the effective date of the MPPAA (April 29, 1980) and the date the MPPAA was actually signed into law (September 26, 1980). The retroactive imposition of withdrawal liability on employers who withdrew during this "corridor" period was the basis for the Ninth Circuit's finding of unconstitutionality.

The PBGC has suggested that it is inappropriate to grant certiorari in this case because the question of retroactivity

¹The aggrieved parties in the other five appeals filed separate Petitions for Rehearing and Suggestions for Rehearing *en banc* before the Ninth Circuit. On September 13, 1983, the Ninth Circuit denied the CPT's Petition for Rehearing and Suggestion for Rehearing *en banc*.

is already before this Court in the *Gray* appeals. While the *Gray* appeals do present *one* retroactivity issue, it is far from clear that the *Gray* appeals will permit the Court to fully address that retroactivity question.

The *Gray* appeals, unlike the *SFC* and *G&R* cases, involve an employer who gave notice of its intention to withdraw from a multiemployer pension plan (by terminating its collective bargaining relationship), in *February, 1980*, well in advance of the effective date of the MPPAA (see Appendix to Jurisdictional Statement in *Pension Benefit Guaranty Corporation, et al. v. R. A. Gray & Co.*, USSC No. 83-245, p. 32-A). By contrast, *G&R* and *SFC* did not withdraw from the CPT until after negotiations for a renewal of their collective bargaining agreement reached an impasse in July, 1980 (see *Carpenters Pension Trust for Southern California v. Shelter Framing Corporation, et al.*, Appendix C to the Petition for Writ of Certiorari, pp. 31-32).

For purposes of constitutional analysis, there may well be a difference between an employer, such as *R. A. Gray & Co.*, who announces its intention to withdraw and takes all steps short of actual withdrawal, prior to the effective date of federal legislation, as contrasted to the situation of employers like *SFC* and *G&R*, who take no binding steps to effect withdrawal until *after* the effective date of the act in question.

Moreover, the decision of the Ninth Circuit Court of Appeals is heavily based on a consideration of the "equities" as they affect the parties. 705 F.2d at 1511-1514. The bulk of the factual record developed in the appellate proceedings relates to the withdrawals of *SFC* and *G&R*. The factual record relating to *R. A. Gray & Co.* is relatively skimpy. Given the heavy reliance which the Ninth Circuit placed on the "equities" and the apparent impact which the factual situations in the *SFC* and *G&R* cases had on the

Ninth Circuit's decision, this Court should have the benefit of the full record of the cases below.

G&R and SFC also suggest, in their briefs in opposition to the petition, that the Ninth Circuit's decision is not in conflict with the decision of the Fourth Circuit in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia*, ___ F.2d ___ (4th Cir. Sept. 8, 1983). With all deference to counsel, this is an absurd assertion. The reasoning of the Fourth Circuit in the *Republic Industries* decision directly conflicts with the Ninth Circuit's holding in *Shelter Framing*. Though each circuit court purported to apply the tests first enunciated in *Nachman v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980), they reach diametrically opposite results. SFC suggests that this is because the peculiar facts of the *SFC* and *G&R* cases make it more inequitable to apply the retroactive provisions of the MPPAA in *SFC* and *G&R* than in *Republic Industries*. Nothing in the *Republic Industries* decision supports this astounding assertion; indeed, the *Republic Industries* court explicitly *rejects* the result reached by the *Shelter Framing* court.²

B. The Court Should Grant Certiorari to Review the Retroactivity Issue Not Raised in the Gray Appeals.

As was noted in the original petition, the *SFC* and *G&R* cases contain a second, broader "retroactivity" issue which the appellants have not sought to raise in the *Gray* appeals. The question is whether the MPPAA's alteration, after the fact, of written contractual obligations of employers such

²"Applying the *Nachman* frame of analysis we, with due respect to the views of the Ninth Circuit, conclude that the retrospective withdrawal liability feature of the 1980 Act is constitutional." *Republic Industries, supra*, Slip Opinion, pp. 20-21.

as SFC and G&R deprives those employers of their right to due process.

Contrary to the assertion of the PBGC, this second retroactivity issue was recognized and discussed in the Ninth Circuit's opinion and that of the U.S. District Court. The Ninth Circuit, in *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, stated that "this case shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon the employers for a completed transaction." 705 F.2d at 1513.

The district court, in *Shelter Framing Corp. v. Carpenters Pension Trust*, also noted the retroactive effect that the MPPAA had upon the withdrawn employer's collective bargaining agreements. "Both plaintiffs were operating under collective bargaining agreements which required them to make contributions to the fund. The collective bargaining agreements explicitly stated that the employer would not incur any further or future liability whatsoever if it should cease making contributions to the fund when it ceased to be bound by the collective bargaining agreement." 543 F.Supp. at 1239. The district court further stated: "MPPAA not only has an immediate effect, but even has a retroactive effect, covering transactions already completed." 543 F.Supp. at 1253.

Indeed, the case authorities on which the courts below rely in analyzing the MPPAA involve exactly the type of due process issue which is being raised here: after-the-fact alteration of contractual obligations; see *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds only*, 446 U.S. 359 (1980).

C. The Issue of Whether Employers Who Defeat Withdrawal Liability Claims May Recover Attorneys' Fees Against Multiemployer Trust Funds Raises Important Questions of Public Policy.

In their briefs in opposition to the Petition for Writ of Certiorari, SFC, G&R and PBGC argue that the question of whether the employers may recover attorneys' fees pursuant to 29 U.S.C. §1451 is not of sufficient public importance to command the attention of this Court.

The issue is, in fact, of great public importance. If multi-employer trust funds must pay the attorneys' fees of prevailing employers in each case in which the fund has unsuccessfully sought to collect a withdrawal liability assessment, the total financial impact on the trust fund could be devastating.³

In the past, this Court has been willing to provide guidance to the lower courts with respect to the policy considerations behind the discretionary award of attorneys' fees under various federal statutory provisions; *see, e.g., Hensley v. Eckerhart*, ___ U.S. ___, 103 S.Ct. 1933 (1983); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

The lower courts need the guidance of this Court in devising a policy with regard to the discretionary award of attorneys' fees in the numerous withdrawal liability actions now pending. The need for such guidance will be particularly acute if the Court should determine that portions of the MPPAA are unconstitutional. Such a determination will

³SFC and G&R have asked for attorneys' fee awards totalling over \$75,000 for the work performed in the appellate phase of their suits against the CPT. They have not yet submitted claims for attorneys' fees incurred in the prosecution of their respective actions in the trial court; however, these fees could easily exceed the amounts sought for the appellate portions of these cases.

certainly give rise to a claim for attorneys' fees in every pending case in which a withdrawal liability assessment has been made against an employer who withdrew from a multi-employer plan during the "corridor" period.

D. The Petition Should Be Granted in Order to Further the Efficient, Orderly and Just Disposition of the Constitutional Challenges to the MPPAA.

The PBGC has argued that the CPT's petition, if granted, would result in the disruption and delay of the *Gray* appeals. If the CPT's petition were granted, however, the CPT would be willing to adhere to the briefing schedule set in the *Gray* appeals. As such, there would not be any delay to the appellants in those appeals. Furthermore, the PBGC, not a party in the present case, would not be adversely affected in any way if the Court granted the CPT's petition.

The Court should not decide these constitutional issues of national importance without the benefit of the full record and the factual situations in the *SFC* and *G&R* cases. It should be noted that the bulk of the briefing before the Ninth Circuit, including extensive references to the legislative history of the MPPAA, was undertaken by the parties in the *SFC* and *G&R* cases.

III.
CONCLUSION.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Dated: November 2, 1983.

Respectfully submitted,

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